

1999

Cherise Roundy Black v. Craig Barney : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

E. Jay Sheen; Robinson & Sheen; Attorneys for Petitioner.

Dean C. Andreasen; Matthew A. Steward; Clyde, Snow, Sessions, Swenson; Attorneys for Respondent.

Recommended Citation

Brief of Appellee, *Cherise Roundy Black v. Craig Barney*, No. 990535 (Utah Court of Appeals, 1999).
https://digitalcommons.law.byu.edu/byu_ca2/2220

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

CHERISE ROUNDY (BARNEY) BLACK,	:	
	:	
Petitioner/Appellee/	:	
Cross-Appellant,	:	
	:	
v.	:	
	:	Case No. 990535-CA
V. CRAIG BARNEY,	:	
	:	
Respondent/Appellant/	:	Priority 15
Cross-Appellee.	:	

BRIEF OF APPELLEE AND CROSS-APPELLANT

APPEAL FROM THE DIVORCE DECREE ENTERED ON
JUNE 8, 1999, BY THE SECOND DISTRICT COURT
FOR WEBER COUNTY, STATE OF UTAH
Judge Stanton M. Taylor Presiding

Dean C. Andreasen (No. 3981)
Matthew A. Steward (No. 7637)
CLYDE SNOW SESSIONS & SWENSON
One Utah Center, Thirteenth Floor
201 South Main Street
Salt Lake City, UT 84111-2216
Telephone: (801) 322-2516
Attorneys for Respondent/Appellant/
Cross-Appellee

E. Jay Sheen (No. 3749)
ROBINSON & SHEEN, L.L.C.
1366 East Murray-Holladay Road
Salt Lake City, Utah 84117
Telephone: (801) 273-0855
Attorneys for Petitioner
-Appellee/Cross-Appellant

FILED

JUN 07 2000

COURT OF APPEALS

PARTIES TO THE PROCEEDINGS
IN THE DISTRICT COURT

The caption of the case on appeal contains the names of all parties to the proceedings in the district court.

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION OF THE APPELLATE COURT	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
Standard of Review	2
STATUTES AND RULES WHOSE INTERPRETATION IS OF CENTRAL IMPORTANCE TO THE APPEAL	2
STATEMENT OF THE CASE	2
Nature of the Case	2
Course of the Proceedings	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I. The Trial Court Properly Awarded Cherise Nonterminable Alimony.	10
II. The Trial Court Correctly Awarded Child Support . .	15
III. The Trial Court Correctly Divided Property and Debts.	19
IV. The Trial Court Should Have Divided the Dental Practice As a Marital Asset	20
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

<u>Alexander v. Alexander</u> , 737 P.2d 221, 223 (Utah 1987)	19
<u>Ball v. Peterson</u> , 912 P.2d 1006 (Utah Ct. App. 1996). . .	15,16,17
<u>English v. English</u> , 565 P.2d 409 (Utah 1977).	10
<u>Hagan v. Hagan</u> , 810 P.2d 478 (Utah Ct. App. 1991)	2
<u>Haumont v. Haumont</u> , 793 P.2d 421 (Utah Ct. App. 1990)	15
<u>Johnson v. Johnson</u> , 855 P.2d 250 (Utah Ct. App. 1993) . .	12,14,15
<u>Kerr v. Kerr</u> , 610 P.2d 1380, 1382-1383 (Utah 1980)	20
<u>Martinez v. Martinez</u> , 818 P.2d 538 (Utah 1991).	11
<u>Martinez v. Martinez</u> , 754 P.2d 69 (Utah Ct. App. 1988). . . .	10
<u>Mitchell v. Mitchell</u> , 527 P.2d 1359 (Utah 1974)	2
<u>Munns v. Munns</u> , 790 P.2d 116 (Utah Ct. App. 1990)	12
<u>Ostler v. Ostler</u> , 789 P.2d 713 (Utah Ct. App. 1990)	18
<u>Rhinehart v. Rhinehart</u> , 963 P.2d 757 (Utah Ct. App. 1998) . .	17
<u>Sorenson v. Sorenson</u> 839 P.2d 774 (Utah 1992)	8,20,21
<u>Walters v. Walters</u> , 812 P.2d 64 (Utah Ct. App. 1991).	19

STATUTES

Utah Code Ann. § 30-3-5(8) (1995 Replacement)	2
Utah Code Ann. § 78-45-7.12 (1995 Replacement).	2,16,17
Utah Code Ann. § 78-2a-3(j) (1996).	1

IN THE UTAH COURT OF APPEALS

CHERISE ROUNDY (BARNEY) BLACK,	:	
	:	
Petitioner/Appellee/	:	
Cross-Appellant,	:	
	:	
v.	:	
	:	Case No. 990535-CA
V. CRAIG BARNEY,	:	
	:	
Respondent/Appellant/	:	
Cross-Appellee.	:	

JURISDICTION OF THE APPELLATE COURT

The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(j) (1996).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

In addition to the issues presented for review in the Brief of Appellant, Cherise Black presents the following issue for review pursuant to her cross-appeal:

1. Should Mr. Black's dental practice be considered a marital asset subject to division?

Standard of Review

The standard of review for all of the issues raised by Mr. Barney is whether the trial court abused its discretion.

We will not disturb the trial court's findings of fact in a divorce proceeding unless such findings are clearly erroneous. On appeal, it is the burden of the party seeking to overturn the trial court's decision to "marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be

'against the clear weight of the evidence,' thus making them 'clearly erroneous.'"

Hagan v. Hagan, 810 P.2d 478, 481 (Utah Ct. App. 1991)

In Mitchell v. Mitchell, 527 P.2d 1359, 1360 (Utah 1974), the court outlined the nature of an appeal of the financial and property interests awarded in a divorce:

In a divorce action, the trial court has considerable latitude of discretion in adjusting financial and property interests, and its actions are indulged with a presumption of validity. The burden is upon appellant to prove that the evidence clearly preponderates against the findings as made; or there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or a serious inequity has resulted as to manifest a clear abuse of discretion.

STATUTES AND RULES WHOSE INTERPRETATION IS OF
CENTRAL IMPORTANCE TO THE APPEAL

Application of § 30-3-5(8) of the Utah Code Annotated (1995 Replacement), is of central importance to the appeal, as is Utah Code Annotated Section 78-45-7.12.

STATEMENT OF THE CASE

Nature of the Case

This is a divorce action.

Course of Proceedings

Cherise filed a complaint for divorce on March 26, 1997. R. 1.

Trial occurred on October 27th and October 29th, 1998. R.526-27. Over objection, expert testimony of the value of Mr. Barney's dental practice was received. R. 994, pp. 234-97. On

June 8, 1999, the trial court entered Findings of Fact and Conclusions of Law and a Divorce Decree. R. 813a-866.

STATEMENT OF FACTS

Nonterminable Alimony

1. Cherise's need for alimony is greater than Mr. Black's ability to provide it, due to the parties' extravagant lifestyle and to Cherise's inability to support herself at the expense level she had had in the marriage. R. 850 (Paragraph No. 32).

2. Mr. Black's ability to pay alimony in the near term is limited by his income and his need to pay child support, back taxes and other obligations. R. 850, 851 (Paragraph No. 35).

3. The alimony award was \$2,000 per month for the first five years and \$3,000 per month thereafter. R. 851, 853 (Paragraph Nos. 36 and 41).

3. Cherise's total alimony award is reduced if she remarries but a portion of the alimony awarded to Cherise is nonterminable. In the near term, her alimony award is reduced by 25% (to \$1,500 per month, versus \$2,000) and after five years the reduction is 33% (\$2,000 per month, versus \$3,000). R. 853, 854 (Paragraph 42).

4. The trial court found that it is unlikely that Cherise will ever be able to earn sufficient income to support her and her family in the lifestyle she enjoyed during the parties' marriage. R. 850 (Finding of Fact No. 31).

5. The trial court made a detailed finding of fact regarding the award of nonterminable alimony:

43. Non terminable alimony is appropriate under the facts of this case because:

a. Although the Petitioner was pursuing a college degree at the time of the parties' marriage, she set aside her personal and educational pursuits in order to raise five children, to be at home with them, to maintain the household and to enable and assist Respondent in obtaining his professional degree as well as develop his professional skills.

b. The Petitioner devoted all of her attention to raising the family and supporting the Respondent during her twenty three years of marriage to the Respondent.

c. Both parties had approximately equal earning capacity, education and experience going into the marriage. During the marriage, Petitioner was not able to advance her earning abilities because of her support of the family and of Respondent's professional education and business.

d. Respondent was able to obtain a dental degree, a graduate degree in dentistry, acquire seventeen (17) years of dental experience and establish his own private practice, giving him the earning ability of \$13,500.00 a month, all with the support of the Petitioner.

e. Both parties were equal contributors in advancing Respondent's educational training.

f. Petitioner assisted in the dental practice when needed.

g. Petitioner has minimal earning capacity and no marketable skills. It is not likely given her age of forty three (43) years that Petitioner will be able to ever attain the skills or earning capacity to support herself at the standard of living she enjoyed during the marriage.

h. Petitioner contributed \$125,000.00 of her inheritance into the marriage.

i. The parties spent all of the money that Respondent earned. The parties are left with virtually no assets to be divided among them at the end of the marriage.

j. The parties have no retirement benefits or savings other than an IRA.

k. Petitioner is entitled to a non-terminable award of alimony because of her contribution to Respondent's increased earning capacity during the marriage.

l. The only way to provide the Petitioner a compensating adjustment for her contribution to the greatly enhanced earning capacity of the Respondent is to award her non-terminable alimony.

m. Non-terminable alimony will be necessary to maintain Petitioner at a standard of living similar to that which existed during the marriage.

n. This award of alimony is not an award of any interest in the professional degree of Respondent. Respondent's income from his practice may change without affecting the amount of alimony he pays to the Petitioner.

o. Respondent has the ability to pay non terminable alimony which is less than the court ordered alimony in paragraphs 36 and 41 above.

(R. 854-856, Paragraph No. 43).

Child Support

6. The trial court made the following findings of fact regarding child support:

23. The parties have three minor children: Angelina Cherise, 12/21/82; Sandin Craig, 9/18/85; and Fabione Sadie Marcella, 12/19/87. Respondent should pay support for these children until each attains age 18 or graduates from high school, whichever occurs last.

24. The parties' children have become accustomed to a high standard of living.

25. The parties' children should be given support at a minimum to allow them to continue their lives with some semblance to what they have had in the past.

26. The children should not be punished financially by this divorce.

27. The children can be and deserve to be maintained at their accustomed standard of living. They need higher child support than the maximum provided by the statutory table.

28. Respondent is able to pay more child support than would be required under statutory guidelines.

29. Respondent can and should pay an amount equal to sixteen point three percent (16.6%) of his current pretax income as child support.

(R. 848, Paragraph Nos. 23-29).

Division of Property

7. The trial court made the following findings of fact regarding the tax obligations of the parties:

15. Respondent should be ordered to pay all of the parties' past due Internal Revenue Service debt for the years 1995 and 1996, to hold Petitioner harmless therefrom and to indemnify Petitioner for any payment she makes thereon. The IRS debt for 1995 is three thousand five hundred fourteen dollars (\$3,514.00). The IRS debt for 1996 is sixty two thousand three hundred twelve dollars (\$62,312.00). . . .

16. Respondent should be ordered to pay all of the parties' past due state tax debts for the year 1996, to hold Petitioner harmless therefrom and to indemnify Petitioner for any payment she makes thereon. The Montana State Tax debt for 1995 is paid in full. The Montana State Tax debt for 1996 is nine thousand six hundred fifty seven dollars (\$9,657.00). . . .

17. In reaching its finding that all tax debt payments should be made by Respondent, the Court has considered the following factors, which the court also finds:

a. The income from which the taxes are assessed was earned [sic] Respondent;

b. The Respondent alone has the earning ability to pay such tax liability;

c. Petitioner contributed her inheritance of one hundred twenty five thousand dollars (\$125,000.00) to the marital estate;

d. Respondent was primarily in control of the family finances during the marriage while the taxes were being incurred.

(R. 844-846, Paragraph Nos. 15-17).

8. The trial court made the following findings of fact regarding marital debts:

21. Respondent is ordered to pay all marital debt incurred prior to April 1997 not specifically addressed under paragraphs 15 through 20 above, to hold Petitioner harmless therefrom and to indemnify Petitioner for any payment she makes thereon. Except as otherwise ordered by this court, Petitioner is ordered to pay all debts separately incurred by her since her bankruptcy in 1998. Respondent is ordered to pay debts separately incurred by him after March, 1997 in addition to the other debts assigned to him by the court. This order of marital debt payment is made, considering the following equities:

a. The Respondent alone has the ability to pay such marital debts;

b. Petitioner contributed her inheritance of one hundred twenty five thousand dollars (\$125,000.00) to the marriage;

c. Respondent was primarily in control of the family finances during the marriage while the marital debts were being incurred.

22. The order that Respondent pay marital debt on behalf of the Petitioner is made by way of further support and maintenance for the Petitioner and is not to be considered a property settlement. Respondent should be ordered to hold Petitioner harmless therefrom

and to indemnify Petitioner for any payment she makes thereon.

(R. 847,848, Paragraph Nos. 21 & 22).

Dental Practice Valuation

9. The trial court made the following findings of fact with respect to the value of Mr. Barney's dental practice:

8. The court could not consider the following equities in dividing the dental assets because of the decision of Sorenson v. Sorenson 839 P.2d 774 (Utah 1992):

a. Petitioner contributed all of her inheritance from her grandfather to the family's expenses in lieu of taking funds from the dental practice for that purpose.

b. The court does not find a specific value in regards to the dental practice because of the decision in Sorenson v. Sorenson, 839 P.2d 774 (Utah 1992). The court cannot consider the value of goodwill and reputation of Respondent's dental practice. Although only forty thousand dollars (\$40,000.00) of the value of the dental practice is divisible as marital property, there was substantial evidence that the dental practice has the value assigned by Petitioner's appraiser of two hundred twenty seven thousand dollars (\$227,000.00) which included goodwill.

c. The parties have the following education and work experience:

i. Respondent completed three years of his bachelor's degree prior to the marriage.

ii. Petitioner attended college prior to the marriage of the parties.

iii. The parties were married in June 1974.

iv. Respondent was accepted to dental school at the University of Iowa beginning the 1974-1975 school year. Respondent's first year of dental school was accepted as credit for the fourth year of his

bachelor's program and he was awarded his bachelor's of science degree in 1975.

v. Respondent's dental schooling at Iowa was paid for by the United States Air Force through a health professional scholarship. Respondent's books, tuition and fees were paid and Respondent received a \$400.00 per month stipend. Both parties worked part-time jobs during schooling to supplement the parties income.

vi. Respondent was awarded his dental degree in 1978.

vii. Respondent also attended the Oregon Health Science University from 1982 to 1984 and was awarded a certificate in periodontics in 1984.

viii. Petitioner left her university studies in Utah to go with Respondent to an out-of-state dental school.

ix. At the time the parties began having children, the parties agreed that Petitioner would stay home to care for the children and the household. Petitioner spent twenty three years of the marriage supporting Respondent by caring for Respondent, raising the parties' five children, and caring for the household while Respondent pursued schooling and developed his career. Petitioner stayed at home with the children throughout the marriage and did not obtain formal schooling or work experience.

x. Petitioner has worked sporadically in Respondent's dental practice substituting for regular office employees and as a dental assistant when necessary. Petitioner also helped Respondent set up and decorate his office.

SUMMARY OF ARGUMENT

The trial court correctly found and ordered that a portion of the alimony to Cherise is to be nonterminable. The trial court made the appropriate findings of fact, which, when taken in their totality, justify the imposition of permanent, nonterminable alimony.

A proper consideration of the needs of the children in setting child support includes considering their general standard of living. The trial court properly ordered child support in this case above the maximum allowed in the table.

There was a proper division of property and marital debts in the divorce.

The trial court erred in not considering the value of Mr. Barney's dental practice as a marital asset divisible in the divorce.

ARGUMENT

I. The Trial Court Properly Awarded Cherise Nonterminable Alimony.

Appellant has failed to establish the impropriety of the trial court's awarding Cherise permanent alimony. This Court, in Martinez v. Martinez, 754 P.2d 69, 74 (Utah Ct. App. 1988), stated: "The standard of review relating to alimony requires that we not disturb the trial court's award unless 'such a serious inequity has resulted as to manifest a clear abuse of discretion.' English v. English, 565 P.2d 409, 410 (Utah 1977)."

In general, awarding alimony requires a trial court to consider "the financial conditions and needs of the wife, the ability of the wife to produce a sufficient income for herself; and the ability of the husband to provide support." *Id.*

The case of Martinez is illustrative and probative. In that case, this Court had increased an award of permanent alimony based on the findings that the marriage had lasted 15 years, Mrs.

Martinez had assisted Mr. Martinez in getting his medical degree, including financial assistance from Mrs. Martinez and her mother, and based on Mr. Martinez substantially increased earning capacity which had not yet benefited the Mrs. Martinez and the family. While a portion of the court of appeals decision (having to do with the medical degree and "equitable restitution") was overturned by the Supreme Court, the award of increased permanent alimony was not.

The Supreme Court, in Martinez v. Martinez, 818 P.2d 538, 542 (Utah 1991) gave the following guidance to trial courts on the issue of awarding alimony, which in the case before it was permanent:

Usually the needs of the spouses are assessed in light of the standard of living they had during marriage. . . . In some circumstances, it may be appropriate to try to equalize the spouses' respective standards of living. . . . When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change, unless unrelated to the efforts put forward by the spouses during marriage, should be given some weight in fashioning the support award. . . . Thus, if one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, it may be appropriate for the trial court to make a compensating adjustment in dividing the marital property and awarding alimony.

Here, the trial court found that the parties would have enjoyed a higher family income because of Dr. Martinez's increased income, which was due to some extent to the efforts of both spouses during the marriage. Although Dr. Martinez earned \$100,000 a year before the parties divorced, Mrs. Martinez had not enjoyed a higher standard of living as a result of that increased income.

(citations omitted).

Mr. Black relies almost exclusively on this Court's decision in Johnson v. Johnson, 855 P.2d 250 (Utah Ct. Ap. 1993), for his assertion that the trial court abused its discretion. The Johnson case is not controlling and is vastly different in setting and result from the present case. Only two findings were made by the trial court in Johnson in support of its award of nonterminable alimony. One finding was a generic "alimony was 'to assist in the support of [Mrs. Johnson],' and the second was the impermissible division of Mr. Johnson's career ('further assist in allowing [Mrs. Johnson] to share in the benefits of [Mr. Johnson's] professional status.'). *Id.* at 251.

This Court dealt summarily with the first finding:

The [trial] court stated that it granted nonterminable alimony "to assist in the support of [Mrs. Johnson]." This is a permissible ground for an alimony award. *See Haumont*, 793 P.2d at 423 (purpose of alimony is to maintain the receiving spouse, as nearly as possible, in the same standard of living that existed during the marriage); *Munns v. Munns*, 790 P.2d 116, 121 (Utah App. 1990 (same)). Standing alone, however, it is not a sufficient reason to extend alimony payments beyond the remarriage of the receiving spouse. To allow nonterminable awards to be based on this justification alone would violate the statutory presumption against such awards, since every alimony award is necessarily based upon this justification.

Id. at 252.

This Court's ruling on this issue is clear and unassailable. Mr. Black incorrectly states the Court's holding as: "a recipient spouse's need for alimony does not support an award of nonterminable alimony." Appellant's Brief at 13. The correct

holding is that the spouse's need, ***standing alone***, is an insufficient basis for awarding permanent alimony. It is, however, properly considered with all other relevant factors.

Mr. Black essentially argues that this Court consider each of the 15 separate findings made by the trial court in support of the award of permanent alimony in isolation. Thus, he concludes, no one of the findings is legally sufficient to justify a permanent alimony award.

Of course, when dealing with an alimony award, which is an equitable remedy, the totality of the circumstances must be considered. When viewed in that appropriate light, the trial court provides more than sufficient justification for its award of permanent alimony.

The Black's marriage was of long duration, 23 years. Cherise sacrificed her own pursuit of a degree (she was enrolled in college at the time of her marriage to Mr. Black) and a career to raise children and manage the household. She assisted in the development of Mr. Black's practice and was actively involved in its progression. She committed a personal inheritance of \$125,000 to the marriage, with nothing now to show for the investment.

Mr. Black has the ability to pay the alimony awarded. The trial court properly considered Mr. Black's earning capacity, his financial needs and those of Cherise in fashioning an award that

requires both parties to reduce their spending and attempt to equalized standards of living so far as possible.

Cherise has limited earning capacity and minimal marketable skills. Given her age and her skills, it is highly unlikely Cherise can ever attain a professional standing similar to Mr. Black's or approaching that which she could have attained had she not married and cared for Mr. Black and their children.

There are virtually no assets to be distributed in a property settlement of this marriage, due to the parties' profligate ways. There are no retirement benefits or savings other than in IRA.

Cherise will need nonterminable alimony to allow her to maintain a standard of living more in line with what she became accustomed to in the marriage.

This is the story told by the trial court's findings of fact. The trial court clearly establishes all the necessary elements to grant permanent alimony. If the trial court has abused its discretion in this case, there can be no case in which permanent alimony is proper.

How different is this from the underlying facts in Johnson? Dramatically different. This Court noted that the Johnson's had "stipulated to an equal division of real and personal property, yielding \$428,000 for her and \$428,000 for him. Each party received over \$200,000 of income-producing personal property." Johnson at 251. Without noting an amount, this Court further

recognized that "The trial court also awarded to Mrs. Johnson one-half of Mr. Johnson's pension plan."

Unlike the present case, Mr. Johnson's career development (with Mrs. Johnson's assistance) had already produced significant tangible assets for division by the parties. No such assets are available for division in the present case, making the trial court's findings of the justification for permanent alimony all the more persuasive.

The Johnson case and others relied on by Mr. Black contain almost no findings of fact, or base their decisions for permanent alimony on impermissible findings. Thus, in Haumont v. Haumont, 793 P.2d 421 (Utah Ct. App. 1990), this Court overturned an award of permanent alimony where the sole justification by the trial court for the award appeared to be that, as a result of her marriage to the petitioner, respondent lost the same amount in alimony from a previous marriage. Johnson, Haumont and others stand in stark contrast to the thorough and complete findings made by the trial court in the instant case.

The decision of the trial court should be upheld.

II. The Trial Court Correctly Awarded Child Support

In Ball v. Peterson, 912 P.2d 1006 (Utah Ct. App. 1996), this Court held: "'In reviewing child . . . support proceedings, we accord substantial deference to the trial court's findings and give it considerable latitude in fashioning the appropriate relief.' . . . We will not disturb the district court's actions

unless the court exceeded the limits of its permitted discretion." *Id.* at 1006. (citation omitted).

Utah Code Annotated Section 78-45-7.12 expressly allows awarding child support payments in excess of the maximum allowed by the Uniform Guidelines, on a "case-by-case" basis. This Court, in Ball, noted that: "Accordingly, under [this statute], the trial court had discretion to order 'an appropriate and just support amount,' so long as it was not less than the highest level specified in the table for the number of children due support." *Id.* at 1014.

In this case, the trial court made adequate findings of the children's needs and these findings were not disputed by Mr. Black at the time of trial or in his brief on appeal. These findings include: (a) the children are accustomed to a high standard of living; (b) their support should allow them to continue their lives with some semblance of what they had in the past; (c) the children should not be punished financially from the divorce; (d) the children need higher support than the table allows; and, (e) Mr. Black is able to provide that support.

These findings stand in stark relief to the dearth of evidence supporting the trial courts' awards in the two cases relied upon by Mr. Black. In Ball, for example, in remanding an award of child support, this Court noted:

The [trial] court declared the total monthly child support award in the following words: "Based upon the above figures [(referring to Mr. Peterson's monthly gross income)], child support should be awarded to [Ms.

Ball] in the amount of \$ 1,520.00 pursuant to the child support guidelines." It appears the trial court arrived at its total monthly child support award through linear extrapolation of the child support table. However, the court provided no findings -- other than Mr. Peterson's income -- to explain how it arrived at \$1,520.

Id. at 1014.

Similarly, in Rhinehart v. Rhinehart, 963 P.2d 757, 760 (Utah Ct. App. 1998), this Court held:

In this case, both the parties and the trial court focused on defendant's dramatic increase in income rather than the children's needs.

. . . .

A demonstration of an increase in the obligor's income alone is not sufficient to increase the child support order. The increase in ability to pay must be considered in light of the children's actual needs in fashioning an "appropriate and just" child support award under section 78-45-7(12).

The trial court did not simply consider Mr. Black's ability to pay more in child support when it established the amount. It specifically found that the children needed the amount awarded to maintain their life styles and so as to avoid punishing them financially because of the divorce.

Mr. Black incorrectly contends that more specific findings were necessary, of a qualitative or quantitative nature, to establish "need." He argues that since the children do not have extraordinary expenses, lessons, private schooling and the like, that no higher award of child support than the maximum under the table, is justified. In fact, "need" is based on accustomed

standards of living, which is the only lifestyle the children in a divorce have come to know.

The findings made by the trial court are in complete harmony with the well-established statements of what constitutes "need" made by appellate courts. Thus, in Ostler v. Ostler, 789 P.2d 713, 716 (Utah Ct. App. 1990), this Court reiterated the accepted definition of need: "Child support awards should approximate actual need and, when possible, assure the children a standard of living comparable to that which they would have experienced if no divorce had occurred." (citation omitted).

Those were the exact findings made by the trial court, and Mr. Black has chosen not to marshal any evidence to dispute the validity of those findings. The burden is on Mr. Black to establish in what way the trial court abused its discretion in making the finding that the children had an accustomed lifestyle that could only be maintained by the award made. This he has not done.

In fact, the evidence is legion and undisputed that the parties had an extravagant lifestyle, lived beyond their substantial means, and that the children participated in that lifestyle right along with the parents.

The trial court's decision regarding child support must be upheld.

III. The Trial Court Correctly Divided Property and Debts

The trial court's decision as to property divisions (including debts) is given substantial deference. The Utah Supreme Court has noted:

This Court endows the [trial] court's adjustment of the financial interests of the parties with a presumption of validity and does not review their values absent a clear abuse of discretion We do not lightly disturb property divisions made by the trial court and uphold its decision except where to do so would work a manifest injustice or inequity.

Alexander v. Alexander, 737 P.2d 221, 223 (Utah 1987).

Contrary to Mr. Black's assertion, the trial court not only may but **must** consider all of the parties' circumstances, including alimony and child support, as it fashions a property division.

This Court, in Walters v. Walters, 812 P.2d 64, 68 (Utah Ct. App. 1991), noted:

In fashioning an equitable property division, trial courts need consider all of the pertinent circumstances. Factors generally considered are: the amount and kind of property to be divided; whether the property was acquired before or during the marriage; the source of the property; the health of the parties; the parties' standard of living, respective financial conditions, needs, and earning capacity; the duration of the marriage; the children of the marriage; the parties' ages at time of marriage and of divorce; what the parties gave up by the marriage; and the necessary relationship the property division has with the amount of alimony and child support to be awarded. Of particular concern . . . is whether one spouse has made any contribution toward the growth of the separate assets of the other spouse and whether the assets were accumulated or enhanced by the joint efforts of the parties.

In this case, Mr. Barney has been helped in establishing his practice by the efforts of his wife at home. Cherise worked with Mr. Barney through the lean years as he was earning his dental degree and working for the military. Mr. Barney began to make large amounts of money within the last five years of the marriage.

In Kerr v. Kerr, 610 P.2d 1380, 1382-1383 (Utah 1980), the court held that "the fact that . . . Plaintiff has not increased her earning capacity to the extent of Defendant, speaks in favor of the trial courts distribution [of two-thirds to the wife]." In the present case, a substantially more drastic difference in earning capacities resulted than in Kerr: Cherise has not worked at all but has raised the family while Mr. Barney obtained his dental degree, gained his experience and built his practice. Cherise is now left at 44 years of age with only a high school education and no marketable skills.

Cherise received \$125,000.00 as inheritance from the sale of her grandfather's farm during the last ten years which money has been absorbed into the marital estate to help the family pay for basic expenses during the lean years.

The trial court's decision on property division was equitable and was supported by the facts and the law.

IV. The Trial Court Should Have Divided the Dental Practice As a Marital Asset

Mr. Barney's business should be considered an asset of the marital estate. In Sorenson v. Sorenson 839 P.2d 774 (Utah

1992), the Supreme Court of Utah held that the husband's solo dental practice had no value to be divided as part of the marital estate. Justice Durham filed a dissenting opinion in which Chief Justice Zimmerman joined. The majority held that based on the appraiser's testimony that the value in the dental practice depended on the Husband's future earning capacity, his practice could be not considered as a marital asset. The dissent thought the Court's holding should be restricted to a finding of no equity only on the value of the practice which depends on the future earning capacity of the spouse. *Id.*

The present case is distinguishable from Sorenson. In this case, the value of the dental practice currently can be separated from the ongoing ability of Mr. Barney to earn in the future. This value makes the practice marketable. Mr. Barney could sell his practice for a substantial sum and go to work for another dentist using his skills and abilities to gain a very good income stream without any ownership in his practice. The value of the practice without Mr. Barney's particular skills and reputation is based upon the combination of the referral base, location, patient list employees, location, accounts receivable and equipment which were assembled during the marriage. Mr. Barney has built a lucrative dental practice in a highly specialized area, periodontics. Not only will Mr. Barney have a substantial income stream from his dental practice, but he will also take with him a practice that has value as well. Cherise should be

entitled to share in the value of Mr. Barney's practice. The trial court erred in not awarding Cherise a equitable portion of the value of Mr. Barney's business.

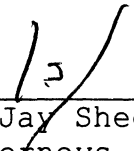
CONCLUSION

The trial court acted properly in its alimony, child support and property division decisions. Its order disallowing any credit to Appellee for the value of Mr. Barney's business should be reversed.

DATED: June 7, 2000.

ROBINSON & SHEEN, L.L.C.

By



E. Jay Sheen
Attorneys for Cherise Black
Appellee/Cross-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2000, two copies of Brief of Appellee/Cross-Appellant were mailed to:

Dean C. Andreasen
Matthew A. Steward
CLYDE SNOW SESSIONS & SWENSON
201 South Main Street
Salt Lake City, UT 84111-2216

A handwritten signature in cursive script, reading "E. Jay Sheen", is written over a horizontal line.

ADDENDUM

Pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure, no addendum to Appellee's Brief is necessary.